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FILED

DEC 24 2007

COURT OF APPEALS
STATE OF WASHINGTON
By

No. 265471

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION III

KITTITAS COUNTY CONSERVATION, et al.,

Petitioners,

v.

KITTITAS COUNTY, a political subdivision of the State of Washington,
Respondent,

BUILDING INDUSTRY ASSOCIATION OF WASHINGTON (BIAW),
CENTRAL WASHINGTON HOME BUILDERS (CWHBA),
MITCHELL WILLIAMS, d/b/a MF WILLIAMS CONSTRUCTION CO.,
TEANAWAY RIDGE, LLC, KITTITAS COUNTY FARM BUREAU

Intervenors,

ART SINCLAIR and BASIL SINCLAIR,

Amicus Parties.

**MEMO OF
KITTITAS COUNTY IN OPPOSITION TO DIRECT
REVIEW**

205 West 5th Ave Room 213
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Neil A. Caulkins
Deputy Prosecuting Attorney
Kittitas County

December 19th, 2007

ORIGINAL

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**MEMO IN OPPOSITION
TO DIRECT REVIEW**

GREGORY L. ZEMPEL
KITTITAS COUNTY PROSECUTOR
KITTITAS COUNTY COURTHOUSE - ROOM 213
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I. INTRODUCTION

Appellant Kittitas County, respondent before the Growth Management Hearings Board, submits this memorandum in opposition to the application by Futurewise for direct review by the Washington State Court of Appeals, Division Three, pursuant to RCW 34.05.518.

II. DISCUSSION

For the Court of Appeals to accept direct review pursuant to RCW 34.05.518(5), it must find "that delay in obtaining a final and prompt determination of the issues would be detrimental to any party or the public interest and either: (i) Fundamental and urgent statewide or regional issues are raised; or (ii) The proceeding is likely to have significant precedential value." RCW 34.05.518(3)(b). None of these criteria are met, and so direct review should not be granted.

A. Absence of Prejudice.

Futurewise has failed to demonstrate how this matter being heard in the Kittitas County Superior Court would be detrimental to any party. Futurewise, at page five of its motion, has failed to demonstrate how vested development applications relate to this appeal of the County's comprehensive plan. One vests to a decision under a development code,

1 and the development code is not at issue in this case. What is at issue are
2 various provisions of the comprehensive plan to which the doctrine of
3 vested rights does not apply.

4 Futurewise has not demonstrated how vested development
5 applications harm the Kittitas Conservation Coalition (KCC). They are a
6 group of county residents who experience no demonstrated impact by the
7 regulations at issue here. There is no evidence that the members of this
8 organization are uniquely harmed by these regulations during the
9 pendency of the appeal that would constitute detriment from any delayed
10 resolution.

11 Futurewise has not demonstrated that any requests for land use
12 classification changes under the existing comprehensive plan are being
13 sought or that such constitute a harm. The reality is that virtually no
14 applications for anything called into question by this case are being made,
15 and so no cognizable harm accrues during the pendency of the appeal.

16 Futurewise has failed to allege any harm from the regulation that is
17 subject of this litigation. Contrary to Futurewise's representations at page
18 five of its motion, the FDO in this matter did not find degradation to water
19 quality, problems with transportation and service delivery, or
20 endangerment of farming and other natural resource uses, much less that
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any such ills were caused by the County's comprehensive plan provisions.

In the absence of any identifiable harms, no prejudice exists for any party or the public that would justify granting direct review.

Futurewise relies upon bare assertions of alleged market instability harming the Central Washington Home Builders Association (CWHBA) at pages five and six of its motion. Futurewise misses the fact that the CWHBA are involved in construction, not real estate speculation and development, and that, regardless of the ultimate maximum rural density in Kittitas County, they will still be building houses. The folks actually involved in real estate development and speculation realize the risks of their endeavors (it is known as real estate speculation for a reason) and proceed accordingly. The allegation at page six of Futurewise's motion that the environment in Kittitas County is so destroyed from the County's use of 3-acre zoning to the point that financing is difficult to obtain or that property is hard to sell is both preposterous and unsupported by the record.

How Futurewise can assert with a strait face that Kittitas County is essentially a 2,315 square-mile superfund site, an overgrown Love Canal, thereby harming the economy as well as its real estate and housing markets, is hard to imagine. These sorts of allegations do not demonstrate the prejudice needed to grant direct review by the Court of Appeals.

1 Any delay in a decision as to appropriate density will not harm
2 those who wish to subdivide property. Those who want to subdivide now
3 can apply and vest under current regulation. Those who wait until the
4 issue is resolved will vest under what ever regulation is ultimately
5 determined to be GMA-compliant. The worst case scenario for those
6 developers who wait is that they will be able to create fewer lots, but those
7 they do create can be sold for more because they will be larger, leaving the
8 developer no worse financially for it.

9 **B. No Fundamental or Urgent Statewide or Regional Issue.**

10 Futurewise's claim (motion at pages six and seven) that the County
11 is destroying all the water to the detriment of its neighbors and poses a
12 vast threat to the State's traffic, wildfire, and agriculture are both ludicrous
13 and unsupported by the record. Similarly absurd and unsupported by the
14 record are Futurewise's claims at page seven of its motion that some gold
15 rush to develop land in Kittitas County has wrought economic destruction
16 upon the real estate and housing markets of all neighboring counties. This
17 sort of allegation does not form the grounds to grant direct review to the
18 Court of Appeals because it demonstrates no fundamental and urgent
19 statewide or regional issue.
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23 **MEMO IN OPPOSITION**
24 **TO DIRECT REVIEW**
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C. Lack of Precedential Value.

There are already numerous cases (cited by all parties in their briefing below) standing for the proposition that there is no bright-line rule as to appropriate levels of rural density. This includes the recent Supreme Court case of Viking Properties. Because of a Supreme Court case on the subject, the presence or absence of a decision from Division Three of the Court of Appeals on the subject is irrelevant. It is also clear from the case law (and the FDO at page 60 in this case) that the local circumstances and the process followed are the keys in arriving at appropriate rural densities.

Therefore, whatever those circumstances and processes are that were used in Kittitas County, they would, by definition, have no applicability to other counties. In short, because this case is not threatening the “no bright line rule” status of the law and will be factually specific to Kittitas County, it lacks the potential for precedential value required under RCW 34.05.518(3)(b)(ii) to justify direct review by the Court of Appeals.

D. Advantages of Case Being Heard in Kittitas County.


The location of the forum is obviously most convenient for all the parties. Most of the parties are from Kittitas County, and it will be closer for both CWHBA and Futurewise to come to Ellensburg rather than Spokane. Contrary to the representations of Futurewise, ultimate review

1 by the Court of Appeals is not a certainty for this matter. The Superior
2 Court decision may well be the ultimate resolution of this case.
3 Regardless, having a well-reasoned trial court opinion will only aid the
4 Court of Appeals' review should this matter eventually be before it.

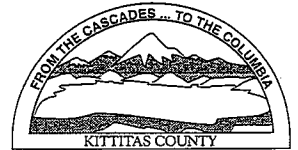
5 III. CONCLUSION

6 For these reasons, Kittitas County opposes direct appellate review
7 of this matter by the Court of Appeals, Division III.

8 Respectfully submitted this 19th day of December
9 2007.

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11 
12 NEIL A. CAULKINS, WSBA #31759
13 Deputy Prosecuting Attorney
14 Attorney for Kittitas County
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Kittitas County Prosecuting Attorney



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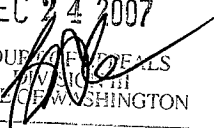
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December 19, 2007

WASHINGTON COURT OF APPEALS
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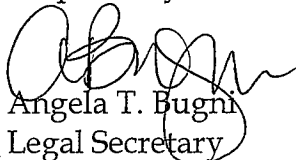
RE: *Kittitas County Conservation, et al v. Kittitas County, et al*
Court of Appeals Numbers: 265471

Dear Clerk:

Enclosed you will find one original and two copies of the Memo of Kittitas County in Opposition to Direct Review and an Affidavit of Mailing regarding the above listed matter. Please conform one copy and return it in the self-addressed, postage-paid envelope provided. Thank you.

If you have any questions, please do not hesitate to contact our office.

Respectfully,



Angela T. Bugni
Legal Secretary

Civil Division

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Intervenors,

ART SINCLAIR and BASIL SINCLAIR,

Amicus Parties.

AFFIDAVIT OF MAILING

ANGELA T. BUGNI, being first duly sworn upon oath, deposes and
says:

I am a citizen of the United States of America and of the State of
Washington, over the age of 18 years, not a party to the above-entitled
proceeding and competent to be a witness therein.

 ORIGINAL

GREGORY L. ZEMPEL
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1 On December 19, 2007, I mailed one copy of the MEMO OF
2 KITTITAS COUNTY IN OPPOSITION TO DIRECT REVIEW, to the
3 following individual(s) at the specified addresses:

4 Andrew Cook
5 Building Industry Association of Washington
6 PO Box 1909
7 111 W 21st Avenue
8 Olympia WA 98507-1909

9 Martha Lantz
10 Assistant Attorney General
11 PO Box 40110
12 Olympia WA 98504

13 Gregory McElroy
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15 1808 N 42nd Street
16 Seattle WA 98103

17 Timothy Harris
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19 111 W. 21st Avenue
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21 Keith Scully
22 Futurewise
23 814 2nd Avenue, Suite 500
24 Seattle WA 98104

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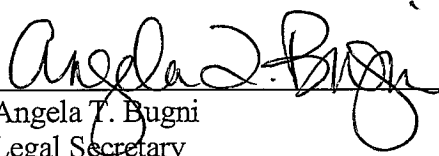
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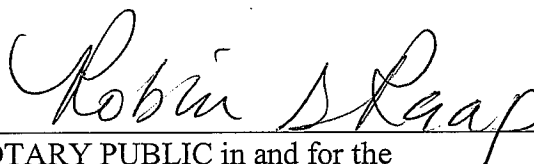
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1 Jeff Slothower
2 Lathrop, Winbauer, Harrel, Slothower & Denison LLP
3 P.O. Box 1088
4 201 W. 7th Avenue
5 Ellensburg WA 98926

6 placing said copies in a sealed envelope with postage prepaid thereon.

7 
8 Angela T. Bugni
9 Legal Secretary

10 SUBSCRIBED AND SWORN to (or affirmed) before me this 19th day of
11 December, 2007.

12 
13 NOTARY PUBLIC in and for the
14 State of Washington.
15 My Commission Expires: 1/15/09

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